Supreme Court, U.S.
FILED
94 2113 JUN 26 1995
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No. 94-___

In The

Supreme Court of the United States

October Term, 1994

TRANSPORTATION INSURANCE BROKERS, INC.,

Petitioner,

vs.

D.W. FERGUSON & ASSOCIATES,
DOUGLAS W. FERGUSON,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, in contravention of this Court's long-standing rule that a general verdict in a civil action must be reversed upon a finding of error as to one or more of the legal theories presented to the jury, the Ninth Circuit Court of Appeals may, in its discretion, affirm a general verdict in spite of the fact that one of the theories submitted to the jury was erroneous.

2. Whether, as the Ninth Circuit has concluded, there are exceptions to this Court's rule requiring reversal of a general verdict upon a finding of error in the legal theories submitted to the jury, an issue as to which the circuit courts of appeals are in conflict.

LIST OF PARTIES AND RULE 29.1 LIST

The parties to the proceedings below were Petitioner Transportation Insurance Brokers, Inc., and Respondents D. W. Ferguson & Associates and Douglas W. Ferguson. Lancer Insurance Co. and Lancer Management Co. were plaintiffs, counter-defendants, and appellants below, but are not parties to this petition.

Petitioner Transportation Insurance Brokers, Inc. has no parent company or subsidiaries.

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In The

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TRANSPORTATION INSURANCE BROKERS, INC.,

Petitioner,

vs.

D.W. FERGUSON & ASSOCIATES,
DOUGLAS W. FERGUSON,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner, Transportation Insurance Brokers, Inc., respectfully prays that a writ of certiorari issue to review the judgment and order of the United States Court of Appeals for the Ninth Circuit, entered January 19, 1995, and the order denying the Petition for Rehearing and Suggestion for Rehearing En Banc, entered May 25, 1995.

OPINIONS BELOW

The judgment and order of the Court of Appeals for the Ninth Circuit is unreported, and is reprinted in the

appendix hereto, page A-1, *infra*. The order of the Court of Appeals for the Ninth Circuit denying the Petition for Rehearing and Suggestion for Rehearing En Banc is unreported, and is reprinted in the appendix hereto, page A-17, *infra*.

JURISDICTION

The jurisdiction of the district court was invoked under 28 United States Code section 1332 based on diversity of citizenship. The United States Court of Appeals had jurisdiction over the case pursuant to 28 United States Code section 1291. The judgment and order of the United States Court of Appeals for the Ninth Circuit was entered January 19, 1995. The order of the court of appeals denying the timely Petition for Rehearing and Suggestion for Rehearing En Banc was entered May 25, 1995. The jurisdiction of this Court is invoked under 28 United States Code section 1254(1).

STATEMENT OF THE CASE

A. Introduction.

The Ninth Circuit Court of Appeals permits a court, in its discretion, to affirm a general verdict even if it finds reversible error as to one of the underlying causes of action. *See, e.g., Traver v. Meshriy*, 627 F.2d 934, 938 (9th Cir. 1980). This Court has held four times that such a verdict must be reversed. No opinion of this Court has recognized or even suggested the possibility of an exception to its stated rule.

Among the circuit courts of appeals which have addressed this issue, most acknowledge this Court's rule as binding and apply it strictly, without exception. A few circuits have discussed the possibility of a harmless error exception, but have rarely found it applicable. The Ninth Circuit's discretionary rule conflicts with the rule applied in each of these other jurisdictions, as it allows for affirmance of a general verdict even where there is no assurance that the erroneous theory did not prejudicially affect the verdict.

In the present case, application of the Ninth Circuit rule permitted the court of appeals to affirm the judgment even though the evidence established without question that the jury actually relied on an erroneous theory, and even though there was no basis to conclude that the verdict did not rest solely on the erroneous theory or that the verdict was not prejudiced thereby.

The Ninth Circuit rule thus allows for a fundamentally unfair and legally insupportable result, directly contrary to that required by this Court and every other circuit which has addressed the issue.

This Court granted review in 1991 in *Griffin v. United States*, 502 U.S. 46 (1991), to clarify the treatment of general verdicts within the *criminal* law context. This case presents the Court with the opportunity to provide similar guidance in the civil law context. Review should be granted to conform Ninth Circuit law to this Court's precedents, and articulate a clear standard to guide the lower courts' practice in reviewing general verdicts in civil actions. Alternatively, the Court should grant a writ of certiorari and summarily reverse the portion of the

court of appeals' decision upholding the judgment against Petitioner. *See, e.g., Florida Dep't of Health & Rehabilitative Servs. v. Florida Nursing Home Ass'n*, 450 U.S. 147 (1981) (per curiam) (summarily reversing where "court below misapplied the prevailing standard for finding a waiver of the State's immunity under the Eleventh Amendment"); *Eaton v. City of Tulsa*, 415 U.S. 697, 701 (1974) (per curiam) (Rehnquist, J., dissenting).

B. Factual And Procedural History.

This case was removed from the State Superior Court to the Federal District Court for the Central District of California. Jurisdiction was invoked under 28 United States Code section 1332 based on diversity of citizenship.

Petitioner and Respondents are insurance brokerage firms. Both Petitioner and Respondents had broker, or "producer," agreements with Lancer Insurance Company ("Lancer") which entitled them to sell and service Lancer insurance policies. Lancer also is a party to this litigation.[1]

Respondents sued Petitioner for unfair trade practices in violation of the Unfair Practices Act, California Business and Professions Code section 17000 et seq., intentional interference with prospective economic

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[1] Lancer commenced this litigation by suing Respondents for breach of contract and other claims. Respondents filed a cross-complaint against Lancer for breach of contract and various tort claims, and a third-party complaint against Petitioner.

advantage, defamation (slander), and intentional infliction of emotional distress, claiming Petitioner convinced Lancer to terminate its producer agreement with Respondents and caused Respondents to lose some former Lancer customers. Respondents alleged Petitioner falsely accused Respondents of engaging in unethical business practices, referred to Respondent Douglas Ferguson in a derogatory manner, and urged Lancer to stop doing business with Respondents. Lancer testified that its decision to terminate Respondents' contract was not influenced by Petitioner's remarks but, rather, was based on information obtained elsewhere regarding Respondents' improper business practices.

The jury returned a general verdict against Petitioner for $72,900 in compensatory damages and $175,000 in punitive damages. The jury also answered a special interrogatory specifically stating it found Petitioner liable for unfair trade practices.[2]

On appeal, Respondents admitted the jury's verdict on the unfair trade practices claim was both legally erroneous and unsupported by the evidence. The California Unfair Practices Act required Respondents to prove that Petitioner violated one of several specific statutory prohibitions. However, Respondents neither alleged nor proved any such violation, but instead submitted their

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[2] The special interrogatory asked the jury the following question: "Do you find for [Respondents] on their third-party complaint versus [Petitioner] for unfair trade practices." (Appellant's Excerpts of Record at 108.) The jury answered "yes." There were no other special interrogatories or explanation for the jury's general verdict. (*Id.*)

claim to the jury based on erroneous instructions that defined an unfair trade practice in broad terms, unsupported by statutory or case authority, encompassing virtually any "unfair" business practice.[3]

Accordingly, Petitioner argued reversal of the judgment was required pursuant to this Court's long-standing rule that a general verdict in a civil case must be reversed on appeal if any one of the underlying claims can be defeated, since the reviewing court cannot determine with certainty whether the jury relied upon, or was influenced by, the invalid theory. (Appellant's Reply Brief at 12-14 [hereinafter "A.R.B."].) Petitioner also pointed out that virtually all of the other circuit courts of appeals which have addressed the issue strictly apply this Court's general verdict rule. (A.R.B. at 13-14.)

In an unpublished Memorandum filed January 19, 1995, the court of appeals affirmed the judgment by applying a different rule created by the Ninth Circuit which allows the court, in its discretion, to affirm a general verdict notwithstanding the presence of error. (Appendix at A-7, A-16 [hereinafter "App."].)[4] The court of

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[3] The jury instructions defined an unfair trade practice as any "unfair, dishonest, deceptive, destructive, fraudulent and/or discriminatory practices which destroyed or prevented fair and honest competition." (Reporter's Transcript at 1361-62 (Appellant's Excerpts of Record at 237-38).)

[4] The court of appeals found all of Respondent's tort claims against Lancer were barred as a matter of law, and remanded for a new trial on the sole remaining contract claim. (App. at A-6 - A-8.) Since the court of appeals' decision to reverse the general verdict against Lancer complied with this Court's general verdict rule, the judgment against Lancer will not be affected by the issues raised in this Petition.

appeals did not address Petitioner's argument that controlling Supreme Court authorities required reversal.

Instead, the court of appeals applied its own discretionary general verdict rule and affirmed the judgment against Petitioner because it concluded that all of the claims other than the erroneous unfair trade practices claim were supported by substantial evidence and free from reversible error, and that there was no evidence of jury confusion. (App. at A-7, A-16.) However, nothing in the record indicated that the jury actually found in Respondents' favor on any of the non-erroneous claims.

Petitioner timely filed a Petition for Rehearing and Suggestion for Rehearing En Banc. Petitioner argued that the affirmance of the judgment here, based upon the Ninth Circuit's discretionary treatment of general verdicts, conflicts with binding Supreme Court authority. (Petition for Rehearing at 5-11.) The court of appeals denied the petition without comment on May 25, 1995. (App. at A-18.) The question whether the Ninth Circuit's discretionary affirmance of general verdicts conflicts with controlling Supreme Court authority, as well as the law of other circuits, is properly before this Court, having been pressed by Petitioner in both its briefing on the merits before the Ninth Circuit and its Petition for Rehearing. *See* A.R.B. at 12-14; Petition for Rehearing at 5-11; *United States v. Williams*, 112 S. Ct. 1735, 1738 (1992).

REASONS FOR GRANTING THE PETITION

A. The Ninth Circuit Precedent Upon Which The Court Of Appeals Relied In Affirming The Judgment Directly Conflicts With Governing Supreme Court Authority.

1. The Ninth Circuit Created Its General Verdict Rule Without Regard To Applicable Supreme Court Authority.

This Court has consistently held that a general verdict in a civil case must be reversed on appeal if any of the underlying claims can be defeated. In *Maryland v. Baldwin*, 112 U.S. 490, 493 (1884), this Court explained:

> [The general verdict's] generality prevents us from perceiving upon which plea they found. If, therefore, upon any one issue, error was committed, either in the admission of evidence or in the charge of the court, the verdict cannot be upheld. . . .

This Court's rule derives from an undeniably sound rationale – that a reviewing court can never confidently know either the basis for a general verdict or whether inclusion of an erroneous theory prejudiced the jury's deliberations. Nothing in the record can illuminate this inquiry, or render it more than pure guesswork.

This Court has reaffirmed its general verdict rule three times, without question or qualification. *Wilmington Star Mining Co. v. Fulton*, 205 U.S. 60, 78 (1907) (where claim was submitted to jury unsupported by evidence, "we find it impossible to say that prejudicial error did not result. . . . And, of course, in a case like the one we are considering, we cannot maintain the verdict, as might be

done in a criminal case, upon a general verdict of guilty upon all counts of an indictment")[5]; *United N.Y. & N.J. Sandy Hook Pilots Ass'n v. Halecki*, 358 U.S. 613, 619 (1959) ("a new trial will be required, for there is no way to know that the invalid claim of unseaworthiness was not the sole basis for the verdict"); *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.*, 370 U.S. 19, 29-30 (1962) (quoting *Maryland*, 112 U.S. at 493).

In 1980, the Ninth Circuit created its own unique rule governing the effect of error upon a general verdict. *Without reference to any of the governing Supreme Court authority*, the court held that where error has been established as to one legal theory, "the reviewing court has *discretion* to construe a general verdict as attributable to another theory if it was supported by substantial evidence and was submitted to the jury free from error." *Traver*, 627 F.2d at 938 (emphasis added).

The Ninth Circuit has adopted *Traver* without question, sometimes treating *Traver* as an exception to the Supreme Court rule, and other times ignoring altogether the existence of binding Supreme Court authority on the subject. *Counts v. Burlington N.R.R. Co.*, 952 F.2d 1136, 1140 (9th Cir. 1991); *Kern v. Levolor Lorentzen, Inc.*, 899 F.2d 772, 777 (9th Cir. 1990); *Benigni v. City of Hemet*, 879 F.2d 473, 477-478 (9th Cir. 1988); *Roberts v. College of the*

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[5] Historically, a general verdict in a *criminal* case was valid as long as it was legally supportable on one of the submitted grounds. *Griffin*, 502 U.S. at 49. Under current law, a criminal verdict may be subject to reversal if one of the theories submitted to the jury was legally inadequate, but will be affirmed if the error involved only insufficiency of the evidence. *Id.* at 58-59.

Desert, 870 F.2d 1411, 1417 (9th Cir. 1988); *Syufy Enterprises v. American Multicinema, Inc.*, 793 F.2d 990, 1001 (9th Cir. 1986), *cert. denied*, 479 U.S. 1031, *and cert. denied*, 479 U.S. 1034 (1987).

The discretionary affirmance allowed by *Traver* unquestionably has become the law in the Ninth Circuit, and its application in the present case is representative of that court's practice.

2. The Conflict Between The Supreme Court And Ninth Circuit Rules Is Direct And Irreconcilable.

The Ninth Circuit's general verdict rule cannot be harmonized or reconciled with this Court's unqualified requirement that a judgment founded upon a general verdict tainted by error must be reversed.

Indeed, one judge of the Ninth Circuit has observed that the *Traver* rule "override[s] sub silentio a procedural rule four times stated by the United States Supreme Court in unequivocal terms." *Kern*, 899 F.2d at 782 (Kozinski, J., dissenting). Since the Ninth Circuit has declined to follow the dictates of this Court, petitioner respectfully urges that this Court direct it to do so.

B. The Procedural Question Presented By This Petition Arises Regularly Before The Courts Of Appeals And Is Of Great Importance.

The use of general verdicts is an established and sanctioned practice in the federal courts. Charles A.

Wright and Arthur R. Miller, *Federal Practice and Procedure*, § 2501, at 151 (1973) ("Most jury-tried civil cases in federal courts are resolved, and always have been, by a general verdict"). And as long as juries continue to return general verdicts, the courts of appeals will be required to decide again and again whether to reverse or affirm the judgment once reversible error is detected in one or more of the underlying legal theories. Thus, the issue presented by this petition will not go away, or lessen in importance.

To the contrary, it has been observed that the Ninth Circuit has been applying its discretionary exception to this Court's rule so frequently that "the exceptions have now submerged the rule." *Kern*, 899 F.2d at 791 (Kozinski, J., dissenting). The present case is another such instance, but undoubtedly will not be the last.

Whether an appellate court applies the correct or incorrect standard for reviewing a general verdict may determine whether the judgment is affirmed or reversed, and thus can affect the outcome of an appeal more dramatically and fundamentally than virtually any other rule applied in the course of the litigation. Direction from this Court is necessary to conform the law of the Ninth Circuit to governing Supreme Court precedent on this important issue.

C. The Ninth Circuit Rule Directly Conflicts With The Law Of Every Other Circuit Which Has Addressed This Issue.

The Ninth Circuit's discretionary rule is in direct conflict with the general verdict rule applied in the other circuit courts of appeals. The judgment here would have

been reversed had it been reviewed in any other federal court in the country.

Every circuit which has addressed this issue has recognized this Court's general verdict rule as applicable and binding.[6] In most of these cases, cited in the margin, the courts applied this Court's rule strictly, acknowledging no exceptions to the general rule.

A number of circuits recognize the possibility of a harmless error exception, which would allow affirmance of a general verdict if the appellate court is "fairly convinced" or "reasonably certain" that the verdict was not influenced by erroneous theories. *Morrissey*, 544 F.2d at 27; *Simko v. C & C Marine Maintenance Co.*, 594 F.2d 960, 967 (3d Cir.), *cert. denied*, 444 U.S. 833 (1979); *Mueller v. Hubbard Milling Co.*, 573 F.2d 1029, 1039 (8th Cir.), *cert. denied*, 439 U.S. 865 (1978); *see also Brochu*, 642 F.2d at 662 (judgment affirmed under "unusual" circumstances where elements required to prove non-erroneous theory were subset of those for erroneous theory, and measures

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[6] *Brochu v. Ortho Pharmaceutical Corp.*, 642 F.2d 652, 662 (1st Cir. 1981); *Morrissey v. National Maritime Union of America*, 544 F.2d 19, 26 (2d Cir. 1976); *Avins v. White*, 627 F.2d 637, 646 (3d Cir. 1980); *Ely v. Blevins*, 706 F.2d 479, 480 (4th Cir. 1983); *Crist v. Dickson Welding, Inc.*, 957 F.2d 1281, 1286 (5th Cir.), *cert. denied sub nom.* 113 S. Ct. 187 (1992); *Virtual Maintenance, Inc. v. Prime Computer, Inc.*, 11 F.3d 660, 667 (6th Cir. 1993), *cert. dismissed sub nom.* 114 S. Ct. 2700 (1994); *Lawndale Nat'l Bank, Under Trust No. 4846 v. American Casualty Co. of Reading, Pa.*, 489 F.2d 1384, 1389 (7th Cir. 1973); *Dudley v. Dittmer*, 795 F.2d 669, 673-74 (8th Cir. 1986); *Farrell v. Klein Tools, Inc.*, 866 F.2d 1294, 1299-1300 (10th Cir. 1989); *Richards v. Michelin Tire Corp.*, 21 F.3d 1048, 1055 & n.13 (11th Cir. 1994); *see also Kern*, 899 F.2d at 790 (Kozinski, J., dissenting) (summarizing law of other circuits).

of damages were identical, thus completely negating the possibility of prejudice).

Not surprisingly, however, with the exception of the *Brochu* case, none of the other courts that have referred to a possible harmless error exception has found it applicable, and thus each reversed the judgment below pursuant to the general rule.

Here, too, the judgment would have been reversed even under a harmless error standard, since there is no basis to conclude the erroneous unfair trade practices claim did not prejudice the verdict or that the jury found for Respondents on any other claim.

This conclusion, in fact, demonstrates what is perhaps the greatest danger of the Ninth Circuit's discretionary rule – that the court's decision whether to affirm or reverse is entirely discretionary. Thus, while the Ninth Circuit's *Traver* decision describes four factors a reviewing court "should" consider to guide its exercise of discretion,[7] a court following the Ninth Circuit rule does not

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[7] *Traver* suggests that:

> [i]n deciding whether to exercise this discretion, the reviewing court should determine the potential for confusion of the jury which may have resulted from an erroneous submission of a particular claim or cause of action, whether privileges or defenses of the losing party apply to the count upon which the verdict is being sustained so that they would have been considered by the jury with reference to the count, the strength of the evidence supporting the count being relied upon to sustain the verdict, and the extent to

have to undertake the complicated (and confusing) analysis suggested by *Traver*. Instead, as occurred here, the court can choose to affirm based on little or no analysis of the case, without even evaluating whether the facts show that the jury's verdict actually rested upon a legitimate theory. (*See* App. at A-16.)

Under similar circumstances, a dissenting Ninth Circuit judge criticized the unfettered discretion the Ninth Circuit rule conferred on the reviewing court, observing the "court could not possibly have known if the verdict was based on due process [on which it affirmed the judgment], equal protection [the possibly erroneous theory], or both. . . . [I]t simply relied on *Traver* without doing the analysis." *Kern*, 899 F.2d at 791 (Kozinski, J., dissenting).

In sum, the discretionary Ninth Circuit rule is completely incompatible with this Court's unqualified rule requiring reversal of general verdicts in civil cases involving error, and with the rule applied in every circuit which has addressed the issue. This Court should grant review to articulate a clear standard to guide the lower courts' implementation of this fundamental rule of federal procedure.

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which the same disputed issues of fact apply to one or more of the theories in question.

Traver, 627 F.2d at 938-39.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

United States Court of Appeals for the Ninth Circuit's Opinion A-1

United States Court of Appeals for the Ninth Circuit's Order Denying Rehearing A-17

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LANCER INSURANCE COMPANY, LANCER MANAGEMENT COMPANY, INC.,	NO. 93-55789
Plaintiffs/Counter-Defendants-Appellants,	DC NO. CIV 91-3314 ER
-vs-	MEMORANDUM*
D.W. FERGUSON & ASSOCIATES, DOUGLAS W. FERGUSON,	(Filed Jan. 19, 1995)
Defendants/Counter-Claim Third-Party Plaintiffs/ Appellees,	
and	
TRANSPORTATION INSURANCE BROKERS, INC.,	
Third-Party-Defendant	
LANCER INSURANCE COMPANY, LANCER MANAGEMENT COMPANY, INC.,	No. 93-55790
Plaintiffs-Counter-Defendants	
-vs-	

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

D.W. FERGUSON & ASSOCIATES, DOUGLAS W. FERGUSON,

Defendant/Counter-Claim Third-Party Plaintiffs/ Appellees

-vs-

TRANSPORTATION INSURANCE BROKERS, INC.,

Third-Party-Defendant-Appellant.

Appeal from the United States District Court
for the Central District of California
Edward Rafeedie, District Judge, Presiding

Argued and Submitted: October 3, 1994
Pasadena, California

Before: Chief Judge WALLACE and REINHARDT, Circuit Judges and TANNER,** District Judge.

Plaintiffs and counter-defendants Lancer Insurance Co. and Lancer Management Co., Inc. ("Lancer") and third-party defendant Transportation Insurance Brokers, Inc. ("TIB") appeal from the denial of post trial motions after a jury verdict entered against them and in favor of defendants and cross-plaintiffs D.W. Ferguson & Associates and Douglas W. Ferguson ("Ferguson")[1] in this

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** The Honorable Jack E. Tanner, Senior United States District Judge for the Western District of Washington, sitting by designation.

[1] On February 14, 1994, the parties filed a stipulation dismissing Ferguson's appeal of the district court's order denying their motion for attorneys' fees and treble damages.

breach of contract and tortious conduct action.[2] We have jurisdiction pursuant to 28 U.S.C. §1291 and for the reasons set forth below we REVERSE as to Lancer and AFFIRM as to TIB.

I. LANCER.

A. Standard of Review.

Lancer filed a post-trial motion for judgment as a matter of law pursuant to Fed.R.Civ.P.50, or alternatively for a new trial pursuant to Fed.R.Civ.P.59. The district court denied the motion. We review the district court's ruling on a motion made pursuant to Fed.R.Civ.P.50 *de novo. McGonigle v. Combs,* 968 F.2d 810, 816 (9th Cir. 1992), *cert. dismissed,* 113 S.Ct. 399 (1992). The denial of a motion under Fed.R.Civ.P.50 is reversible error "when it is clear that the evidence and inferences cannot reasonably support judgment in favor of the opposing party." *Transgo, Inc. v. AJAC Transmission Parts Corp.,* 768 F.2d 1001, 1014 (9th Cir. 1985) (discussing the denial of a motion for JNOV – the term used prior to the 1991 amendment to Rule 50), *cert. denied,* 474 U.S. 1059 (1986). We review the ruling on a motion for a new trial for abuse of discretion. *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.,* 668 F.2d 1014, 1026 (9th Cir. 1981), *cert. denied,* 459 U.S. 825 (1982).

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[2] Ferguson has conceded that the district court erred in allowing their unfair trade practice claim to go to the jury.

B. The Litigation Privilege.

Under Cal.Civ.Code §47(b) certain communications are privileged. In order for Lancer to avail itself of the privilege, the communications at issue must be "(1) made in judicial or quasi-judicial proceedings; (2) by litigants . . . ; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action." *Silberg v. Anderson*, 786 P.2d 365, 369 (Cal.1990). The litigation privilege, if it applies, is a bar to all of Fergusons' tort claims. The claims for defamation, intentional interference with prospective economic advantage, and intentional infliction of emotional distress all fail if the privilege is applicable to the facts of the present case. *Id.* at 371.

Lancer seeks to cloak two separate classes of communications with the privilege. First, they seek to protect telephone calls from Lancer representatives Bob Riley and Al Sue to Ferguson customers between May 6 and May 8, 1991 informing the customers of the upcoming litigation between the parties and directing the insureds to pay their premiums directly to Lancer. Second, they seek to protect letters which were sent on or about May 16, 1991 to the insureds as follow-ups to the phone calls. The complaint was filed on May 10, 1991.

The four *Silberg* factors clearly apply to both the letter and the phone calls. The phone calls were made a few days before the complaint was filed, and the letters were sent shortly thereafter. *See Cayley v. Nunn*, 235 Cal. Rptr. 385, 387-88 (Cal. App. 1987) ("The privilege embraces preliminary conversations attendant upon such proceeding so long as they are in some way related to or

connected to the pending or contemplated actions"). Both the letter and the phone calls were by the same litigating party and had the object of furthering the litigation by instructing the insureds to send their premiums directly to Lancer thereby attempting to mitigate their damages. Furthermore, it is clear that the communications had some logical relation or connection to the proceeding. Lancer was telling the insureds the basis of their lawsuit. The communications had the object of directing the premium payments to Lancer and away from Ferguson. "Any doubt as to whether such relationship or connection existed must be resolved in favor of a finding of privilege." *Costa v. Superior Court (Passalacqua)*, 204 Cal. Rptr. 1, 3 (Cal. App. 1984).

Ferguson makes one argument that we need address in some detail. He argues that the district court (and thereby this court due to the nature of our review) could reasonably conclude that Lancer sued in order to invoke the privilege and immunize the communications. Thus, he argues that the statements were not in good-faith anticipation of litigation, and therefore, the court can not rule as a matter of law that the privilege existed. *See Furhman v. California Satellite Systems*, 231 Cal. Rptr. 113, 118-19 (Cal. App. 1986). The evidence that the litigation was manufactured was weak. During the trial, Lancer's in-house counsel was cross-examined by Ferguson and asked:

> "Q. Mr. Maher, is it your testimony that the Lancer Insurance Company brought this lawsuit against Mr. Ferguson to recover $312.92?
>
> A. No, sir, I didn't testify to that.

Q. I asked you if it is – if that is your position?

A. No."

At no point, however, is this evidence or inferences therefrom turned into an affirmative argument that the lawsuit was initiated merely to cover the communications with the privilege. In fact, Ferguson, during his closing argument, argues that it takes longer than four days to prepare a complaint. A reasonable jury could infer from this argument that Lancer had preplanned the filing of the lawsuit, and, therefore, that the lawsuit was not instituted to cover the previous communications. This position is contrary to the idea that the lawsuit was begun in bad faith, and that the communications at issue were not in good faith anticipation of litigation.

Ferguson failed to come forth with any evidence to support his claim that the communications were not privileged. The district court clearly erred in failing to find that the litigation privilege under Cal.Civ.Code §47(b) applied. It is therefore "clear that the evidence and inferences cannot reasonably support judgment in favor of [Lancer]." *Transgo*, 768 F.2d at 1014. Because punitive damages were based on the tort claims, to which the privilege applies, they must be set aside.

C. The General Verdict Form.

The verdict form in this case did not separate the various theories of recovery. It merely asked whether the jury found in favor of one party or another and for how much.

> As a general rule, "a general jury verdict will be upheld only if there is substantial evidence to support each and every theory of liability submitted to the jury." *Syufy Enterprises v. American Multi-cinema, Inc.*, 793 F.2d 990, 1001 (9th Cir. 1986); *see also Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.*, 370 U.S. 19, 29-30, 82 S.Ct. 1130, 1135-36, 8 L.Ed.2d 305 (1962). However, we may construe a general verdict as attributable to one of several theories if it was supported by substantial evidence and was submitted to the jury free from error. *Traver v. Meshriy*, 627 F.2d 934, 938 (9th Cir. 1980). The factors we must consider in deciding whether to exercise this discretion are: (1) the potential for confusion of the jury; (2) whether the losing party's defenses apply to the count upon which the verdict is being sustained; (3) the strength of the evidence supporting the count relied upon to sustain the verdict; and (4) the extent to which the same disputed issues of fact apply to the various legal theories. *Id.* at 938-39.

Kern v. Levolor Lorentzen, Inc., 899 F.2d 772, 777 (9th Cir. 1990) (footnote deleted).

The only claim that survives regarding Lancer is the breach of contract claim. Under the fourth factor cited, the disputed issues of fact were different as between the contract and tort theories. Because only one of five theories of recovery has survived our decision here today, we decline to exercise our discretion to save this verdict. We therefore remand to the district court to enter judgment for Lancer on Fergusons' claims for defamation, intentional interference with prospective economic advantage,

and intentional infliction of emotional distress, and to set a new trial on the contract claims.

II. TIB.

A. Standard of Review.

TIB also filed a post-trial motion for judgment as a matter of law pursuant to Fed.R.Civ.P.50, or alternatively for a new trial pursuant to Fed.R.Civ.P.59. The standard of review is set out under section I.A., *infra*.

B. The Common Interest Privilege.

The litigation privilege does not apply to TIB. However, under Cal.Civ.Code §47(c), a communication falls within the common interest privilege if it is

> without malice, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such a relation to the person interested as to afford a reasonable ground for supposing the motive for the communication to be innocent, or (3) who is requested by the person interested to give the information.

Cal.Civ.Code §47(c). If the defamation defendant shows that the communication is privileged, the defamation plaintiff bears the burden of pleading and proving malice. *Lundquist v. Reusser*, 875 P.2d 1279, 1280 (Cal. 1994). The district court denied TIB's proposed jury instructions applying the common interest privilege and rejected their

arguments in their motion under Fed.R.Civ.P.50 that the common interest privilege existed as a matter of law.[3]

TIB argues that it had a common interest with Lancer, as they had the relationship of producer to insurer. Lancer had an interest in its own well-being, TIB shared this interest as it depended on Lancer's well-being to sell Lancer policies and reap commissions, and TIB's allegations about Ferguson's selling insurance by putting Lancer in a negative light concerned that common interest. Ferguson does not attempt to refute the existence of the privilege as to TIB.

Instead, Ferguson argues that, regardless of whether Lancer, and therefore TIB, and the customers had a common interest, the fact that the jury found punitive damages indicates that any failure to instruct the jury about the common interest privilege is harmless error. If the jury found malice to support punitive damages, it would have found malice to refute the common interest privilege if asked.

The California Supreme Court has recently addressed this issue and applied harmless error analysis when a trial court erred by failing to instruct a jury on the common interest privilege. In *Lundquist, supra,* as in the case before us, there was a jury award of punitive damages. The court found harmless the instruction error because the jury necessarily found malice in awarding punitive

---

[3] Lancer also raises the same issues. However, because we have ruled that the litigation privilege applies to Lancer, we need not address this or any other arguments made by Lancer.

damages. *Lundquist*, 875 P.2d at 1291-92. The existence of malice defeats the common interest privilege.

Here, the district court erred in failing to instruct on the common interest privilege. However, because the jury also awarded punitive damages, an element of which is malice, any error in failing to instruct was harmless.

C. The Privilege of Competition.

TIB appeals from the denial of its motion under Fed.R.Civ.P.50 as to the intentional interference with prospective economic advantage claim. It claims that the district court erred by ruling that it was not protected by the privilege of competition. The California courts recognize the privilege of competition as set forth in the Restatement of Torts, Second §768:

> (1) One who intentionally causes a third person not to enter into a prospective contractual relation with another who is his competitor or not to continue an existing contract terminable at will does not interfere improperly with the other's relation if
>
> (a) the relation concerns a matter involved in the competition between the actor and the other and
>
> (b) the actor does not employ wrongful means and
>
> (c) his action does not create or continue an unlawful restraint of trade and
>
> (d) his purpose is at least in part to advance his interest in competing with the other. . . .

See A-Mark Coin. Co. v. General Mills, Inc., 195 Cal. Rptr. 859, 867 (Cal. App. 1983). Under the appropriate standard of review, the district court's denial of the motion should be affirmed if there is substantial evidence showing that the above elements were not met. TIB cannot show that it did not employ wrongful means because there is substantial evidence to show that company employees slandered Ferguson. The jury could rightfully find that the statements by TIB to Lancer that Ferguson was negative selling, and that he was "queer", "homosexual", and a "scumbag" were slanderous. Thus, TIB is not entitled to protection from its comments by the privilege of competition.

D. Causation and Damages.

TIB also challenges the district court's denial of its motion under Fed.R.Civ.P.50 on the grounds that there was not sufficient evidence of causation or damages. The denial of the motion should be affirmed if there is substantial evidence to support Ferguson's positions. *See* section I.A. *infra.* Cause is established if the communications were a substantial factor in causing emotional distress and reputational injury, *United States Fidelity and Guar. Co. v. American Employer's Ins. Co.*, 205 Cal. Rptr. 460, 465 (Cal. App. 1984), and but for cause of the impairment with Ferguson's business relations. *Youst v. Longo*, 729 P.2d 728, 733 (Cal. 1987). To affirm the denial of the motion as to damages, there must be evidence that the damages were reasonably certain. Recovery will not be denied simply because damages are difficult to ascertain. *See Pollack v. Lyttle*, 175 Cal. Rptr. 81, 86 (Cal. App. 1981).

There was ample evidence that TIB employees told Lancer personnel that Ferguson was "negative selling," was "unethical," "gay," "a queer," "homosexual," "a scumbag," and that "he didn't take the best care of his customers." TIB also tried to get Lancer to terminate Ferguson's producer agreement and to "let us write that business for you." It is undisputed that Lancer terminated the producer agreement. It is also undisputed that Ferguson testified that the loss of his Lancer business and the surrounding events caused him headaches, stress, asthma, and other health problems. A reasonable jury could conclude that TIB's comments to Lancer caused Ferguson emotional distress both directly and indirectly. The comments directly inflicted injury when Ferguson became personally aware of the actual accusations, and the comments indirectly inflicted additional injury both when they induced Lancer to terminate the producer agreement and when Lancer further circulated them. Although Lancer's employees testified that they did not rely on TIB's comments in terminating Ferguson's producer agreement, substantial evidence exists that they in fact did. Based upon the amount of the evidence presented, a reasonable jury could disregard Lancer's testimony and find that TIB's comments did affect Lancer's decision.

Ferguson introduced testimony that he lost $26,000 in commissions and $5,000 in lost interest on those commissions. He introduced evidence showing that he is a successful bus insurance broker with a five year relationship with Lancer and that his sales kept increasing. He introduced evidence of his projected business losses over five,

ten, and fifteen years. The five-year figures were presented with three percent and six percent discount rates at $285,000 and $269,723. The jury assessed $128,800 in compensatory damages against Lancer and $72,900 against TIB. The lost commission amounts, coupled with the business losses as well as the emotional distress testimony, equates to substantial evidence supporting the award of $72,900 in damages against TIB.

E. Punitive Damages.

We will review the punitive damages award under both California and federal law.

1. California Law.

California courts of appeal review punitive damage awards to see whether "the award is excessive as a matter of law or raises a presumption that it is the product of passion or prejudice." *Adams v. Murakami*, 813 P.2d 1348, 1350 (Cal. 1991) (citing *Neal v. Farmers Ins. Exch.*, 21 Cal. 3d 910, 928, 582 P.2d 980, 148 Cal. Rptr. 389 (1978)). The review consists of three factors: the nature of the defendant's wrongdoing, the amount of the compensatory award, and the wealth of the defendant. "Because the quintessence of punitive damages is to deter future misconduct by the defendant, the key question before the reviewing court is whether the amount of damages 'exceeds the level necessary to properly punish and deter.' " *Id.* (citing *Neal, supra.*)

The jury could reasonably find that TIB's slander of Ferguson as previously set forth in this disposition was

reprehensible. TIB was making these statements to Lancer over a three-year period. Such conduct, the jury could reasonably determine, should not be countenanced.

The jury awarded Ferguson $175,000 in punitive damages against TIB. This is approximately two and one-half times the amount of compensatory damages awarded. This is well within the ratio California courts have previously upheld. *See Wollersheim v. Church of Scientology,* 6 Cal. Rptr. 2d 532, 548-55 (Cal. App. 1992) (Appendix).

TIB stipulated that its net worth was $621,000 with a gross income in 1991 of $4,000,000. It reported earnings in 1991 of $25,000 but paid salaries of $300,000 each to the company's two owners. The punitive damages award was 28 percent of TIB's net worth. California courts have upheld an award of 50 percent of a defendant's net worth. *See Douglas v. Ostermeier,* 2 Cal. Rptr. 2d 594, 605-07 (Cal. App. 1991). In addition to the stipulated net worth, a reasonable jury could have considered the salaries paid to TIB's owners in determining the amount of punitive damages to award. Punitive damages of $175,000 do not appear to us to be borne of "passion or prejudice" on the part of the jury, nor does the award "exceed the level necessary to punish and deter." *Adams,* 284 Cal. Rptr. at 320.

2. Federal Law.

In *Pacific Mutual Life Insurance Co. v. Haslip,* 499 U.S. 1 (1991) the Supreme Court set out the factors to determine whether punitive damage awards are excessive:

> (a) whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred; (b) the degree of reprehensibility of the defendant's conduct . . . ; (c) the profitability to the defendant of the wrongful conduct . . . ; (d) the "financial position" of the defendant; (e) all the costs of litigation; (f) the imposition of criminal sanctions for its conduct, these to be taken in mitigation; and (g) the existence of other civil awards against the defendant for the same conduct, these also to be taken in mitigation.

Haslip, 499 U.S. at 21-22.

The award against TIB withstands scrutiny here also. In addition to the analysis done under California law, factor (c) also weighs in favor of the award because TIB gained some of Ferguson's Lancer customers after the termination.

3. Jury Instruction.

TIB also claims that the district court erred in failing to properly instruct the jury on punitive damages. However, TIB failed to object to the instruction as given. Fed.R.Civ.P.51 requires that a party specifically object to a jury instruction it later seeks to assign as error. We strictly construe this rule, *see Grosvenor Properties Ltd. v. Southmark Corp.*, 896 F.2d 1149, 1152 (9th Cir. 1990) and deem this issue waived.

F. The General Verdict.

The standard to be applied is addressed in section I.C. *supra.* In applying the *Kern* test, we note that any confusion the jury may have had with regard to the unfair trade practices count was eliminated by the district court's answer, on the record, to the jury's question. The district court stated:

> . . . The question about unfair trade practices is simply a question that we are asking you to answer. It has nothing to do with – this is a question that the court wants answered.
>
> * * *
>
> JUROR WORILLOW: Under "A" the question you want answered is just unfair trade practices, that has nothing to do with punitive damages or anything else?
>
> THE COURT: That's right. That a separate question.
>
> JUROR WORILLOW: Okay.

Because all other causes of action against TIB are supported by substantial evidence and are free from reversible error, the general verdict and the punitive damage award against TIB are AFFIRMED.

CONCLUSION

The district court's judgment against Lancer is REVERSED and REMANDED for a new trial on the contract claims. The district court's judgment against TIB is AFFIRMED.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LANCER INSURANCE CO.;, LANCER MANAGEMENT CO., Plaintiffs/Counter-Defendants/Appellants, -vs- D.W. FERGUSON & ASSOCIATES; DOUGLAS W. FERGUSON, Defendants/Counter-Claim Third-Party Plaintiffs/ Appellees, -vs- TRANSPORTATION INSURANCE BROKERS, INC., Third-Party Defendant.	No. 93-55789 D.C. No. CV-91-03314-ER
LANCER INSURANCE CO.; LANCER MANAGEMENT CO., Plaintiffs/Counter-Defendants, -vs- D.W. FERGUSON & ASSOCIATES; DOUGLAS W. FERGUSON, Defendants/Counter-Claim Third-Party Plaintiffs/ Appellees,	No. 93-55790

-vs-	)	ORDER DENYING REHEARING
TRANSPORTATION INSURANCE BROKERS, INC.,	)	
Third-Party Defendant/ Appellant.	)	(Filed May 25, 1995)

Before: WALLACE, Chief Judge, REINHARDT, Circuit Judge, and TANNER,* District Judge.

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for rehearing en banc is rejected.

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* Honorable Jack E. Tanner, United States District Judge, Western District of Washington, sitting by designation.

Supreme Court, U.S.
FILED
JUL 25 1995
CLERK

No. 94-2113

In The

Supreme Court of the United States

October Term, 1995

TRANSPORTATION INSURANCE BROKERS, INC.,

Petitioner,

vs.

D. W. FERGUSON & ASSOCIATES,
DOUGLAS W. FERGUSON,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, in the context of a challenge to the preservation of a general verdict following the abandonment of an included cause of action, *certiorari* is proper in a case based principally upon its unique factual record which demonstrates (a) overwhelming evidence in support of all remaining theories contained within the verdict; (b) substantial egregious conduct on behalf of the petitioning party; and (c) an on-the-record discussion between the court and jury further demonstrating the elimination of any possible jury confusion.

2. Whether the circuits truly are in such direct conflict on the preservation of general verdict issue, in light of the various formulations recognizing a limited exception to the general rule for facts such as those raised in this appeal.

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No. 94-2113

In The

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October Term, 1995

TRANSPORTATION INSURANCE BROKERS, INC.,

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D. W. FERGUSON & ASSOCIATES,
DOUGLAS W. FERGUSON,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

A. FACTUAL HISTORY

The facts of this case are egregious. Petitioner, TRANSPORTATION INSURANCE BROKERS, INC. ("TIB"), and respondents, D. W. FERGUSON & ASSOCIATES and DOUGLAS W. FERGUSON (collectively "Ferguson"), were insurance brokers competing for the business of LANCER INSURANCE COMPANY ("Lancer"). TIB was Lancer's largest producer and was responsible for 80% to 90% of Lancer's business on the

west coast. (RT 354:5 - 356:2.) Having previously acquired ATIS, its prior main competitor (RT 354:21 - 355:2), TIB embarked upon a campaign to destroy Ferguson, its principal remaining competition.

The record is replete with instances of TIB's attempts to injure Ferguson, most of which fall into three overlapping categories. First, TIB attacked Ferguson's business reputation. Larry Kalior ("Kalior"), one of TIB's owners, advised Lancer that Ferguson was unethical. (RT 738:5-9.) Lancer's own former vice president, John Lavin ("Lavin"), testified that both Kalior and Ron Geller ("Geller"), TIB's other owner, told him that Ferguson was "not trustworthy" and that he was a "scumbag." (RT 761:10 - 762:16.) Karen Cole ("Cole"), a TIB employee, conceded that she had heard Geller state that Ferguson "didn't take the best care of his customers." (RT 1117:18-22.)

Second, TIB attacked Ferguson's personal reputation. Lavin testified that Geller and Kalior told him and another marketing associate that Ferguson was a "homosexual" and "gay" and a "queer." (RT 762:7 - 763:14.) On another occasion, Kalior advised Lavin that he "should not sit next to Doug [Ferguson] because he's gay." (RT 764:7 - 765:6.) Cole admitted that Geller had referred to Ferguson as a homosexual. (RT 1117:14-15.)

Third, TIB attempted to interfere directly with Ferguson's relationship with Lancer. Geller and Kalior actually advised Lancer to "shut him down" and "let us write that business for you." (RT 767:10-18.) It was undisputed that TIB said "negative things about Doug Ferguson" to Lancer (RT 761:10-16) and that TIB advised Lancer that Ferguson was "negative selling." (RT 766:16 - 767:9.)

TIB's campaign succeeded. Despite the fact that Ferguson's business relationship with Lancer was highly advantageous to Lancer (who repeatedly acknowledged this fact (Exhibit 646; Exhibit 738; Ferguson ER at 1, 2)), Lancer terminated Ferguson in May of 1991.[1] (Exhibit 78; Lancer ER 4.) This termination was particularly surprising given the fact that only two months earlier Lancer had forwarded to Ferguson a summary of his five-year production history with Lancer (RT 890:8 - 891:9; Exhibit 85; Ferguson ER at 3), noting the steady increase in volume and that "the book has been good to us." Lancer's praise was not surprising, given the fact that Ferguson had doubled his production in one year and continued to improve his loss ratio. (RT 891:2-5.)

TIB, along with Lancer, then accelerated its efforts to destroy Ferguson's business as well as his reputation. In this regard, much of the trial consisted of testimony from Ferguson's customers who had been contacted by Lancer and TIB and advised that Ferguson had embezzled funds, had misappropriated funds and was a fraud. In an industry where a producer's reputation is paramount (RT 671:10-13), these malicious attacks, all of which were false, were devastating. As a result of the efforts of TIB and Lancer, Ferguson testified that he lost business, sustained damage to his reputation and suffered substantial physical and emotional distress.

---

[1] While TIB's petition recites that "Lancer testified that its decision to terminate [Ferguson's] contract was not influenced by [TIB's] remarks" (Petition, P. 5), the jury's verdict confirms that they did not believe that testimony.

B. PROCEDURAL HISTORY.

Although Lancer initiated the litigation, Ferguson prevailed on his counterclaim against Lancer and third-party complaint against TIB. The jury awarded $128,800 in compensatory damages and $225,000 in punitive damages against Lancer and $72,900 in compensatory damages and $175,000 in punitive damages against TIB. All aspects of both awards were upheld by the trial court, despite lengthy post-trial motions filed on behalf of both parties. (CR 151.)

Based upon the litigation privilege under California *Civil Code* Section 47(b) (not applicable to TIB), the appellate court reversed the jury's verdict as to Lancer and awarded judgment on behalf of Lancer on Ferguson's tort claims. Ferguson's breach of contract claim against Lancer was remanded for retrial. Significantly, in evaluating its own limited exception to the general rule that a general verdict may not stand if any cause of action is tainted, the Ninth Circuit did not attempt to preserve the verdict against Lancer. That exceptional remedy was reserved for the verdict against TIB, where the evidence was so overwhelming and so egregious.

The verdict as to TIB was affirmed in all respects, the Ninth Circuit acknowledging the inapplicability of the litigation privilege as to TIB and articulating the various bases for preserving the general verdict as to TIB. (A-16.) On this petition, TIB does not challenge any aspect of the Ninth Circuit's ruling other than the general verdict issue.

TIB's petition is based upon the fact that in addition to finding for Ferguson on causes of action for interference with prospective economic damage, defamation (slander) and intentional infliction of emotional distress, the general verdict also encompassed a cause of action for unfair trade practices under California *Business and Professions Code* Section 17000, *et seq.*[2]

The trial court record provided the appellate court ample basis for affirming the verdict as to TIB despite the abandonment of the statutory claim. First, as TIB notes in its petition, the jury was asked a special interrogatory on the statutory claim, thereby setting apart that theory. More importantly, however, the appellate court in its opinion emphasized the fact that the jury specifically asked a question concerning the statutory claim which allowed the district court, through its answer, to eliminate any potential confusion which the abandoned claim might have caused. Page A-16 of the Ninth Circuit's opinion recites the following discussion between the court and the jury:

> (THE COURT): . . . The question about unfair trade practices is simply a question that we are asking you to answer. It has nothing to do with – this is a question that the court wants answered.

---

[2] While performing additional research in preparation for the appeal, Ferguson concluded that the statutory claim was not actionable and the parties stipulated to dismiss Ferguson's cross-appeal encompassing that issue. In addition, Ferguson no longer sought to affirm that portion of the jury's verdict which granted relief on the basis of the statutory claim.

* * *

JUROR WORILLOW: Under "A" the question you want answered is just unfair trade practices, that has nothing to do with punitive damages or anything else?

THE COURT: That's right. That a separate question.

JUROR WORILLOW: Okay.

(Ninth Circuit Opinion, A-16.)

After rendering its opinion, the Ninth Circuit subsequently denied TIB's petition for rehearing. (A-17.) On July 10, it denied TIB's motion for stay of mandate. (Application for Stay, Exhibit 2.)

For similar reasons, this petition should be denied in its entirety. The case is unique, the factual record overwhelming. It contains a rare opportunity (on the record) for the trial court to dispel any potential confusion which the abandoned cause of action might have caused. Ferguson respectfully submits that if an appellate court is ever to be invested with the discretion to review a record and sustain a verdict based upon the overwhelming weight of the evidence, this appeal presents such a record. At the very least, this petition does not present circumstances under which this Court's limited review should be utilized.

REASONS FOR DENYING THE WRIT

A. THE NINTH CIRCUIT PROPERLY APPLIED ITS LIMITED EXCEPTION TO PRESERVE THE VERDICT AGAINST TIB.

In analyzing the verdict issue in its opinion below, the Ninth Circuit cited *Kern v. Levolor Lorentzen, Inc.*, 899 F.2d 772, 777 (9th Cir. 1990), in stating the following:

> As a general rule, "a general jury verdict will be upheld only if there is substantial evidence to support each and every theory of liability submitted to the jury." *Syufy Enterprises v. American Multi-cinema, Inc.*, 793 F.2d 990, 1001 (9th Cir. 1986); *see also Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.*, 370 U.S. 19, 29-30, 82 S. Ct. 1130, 1135-36, 8 L. Ed. 2d 305 (1962). However, we may construe a general verdict as attributable to one of several theories if it was supported by substantial evidence and was submitted to ~~the~~ jury free from error. *Traver v. Meshriy*, 627 F.2d 934, 938 (9th Cir. 1980). The factors we must consider in deciding whether to exercise this discretion are: (1) the potential for confusion of the jury; (2) whether the losing party's defenses apply to the count upon which the verdict is being sustained; (3) the strength of the evidence supporting the count relied upon to sustain the verdict; and (4) the extent to which the same disputed issues of fact apply to the various legal theories. *Id.* at 938-39. *Kern v. Levolor Lorentzen, Inc.*, 899 F.2d 772, 777 (9th Cir. 1990) (footnote deleted).

(Ninth Circuit Opinion, A-7.)

Though the Ninth Circuit chose not to preserve the verdict against Lancer because of the litigation privilege,

these facts presented a paradigm case for applying the limited exception as to TIB. The evidence was overwhelming on all counts. All of the remaining counts were free from reversible error. The same facts applied to all causes of action. In short, this record allowed the appellate court to conclude that the remaining causes of action were necessarily free from doubt.

This conclusion was bolstered by the discussion between the court and the jury in which the jury was specifically advised that the statutory claim was a "separate question" as fully set forth above. This unique record provided the appellate court with further evidence that any potential for confusion had been nullified. In short, the record below does not support the request for *certiorari*.

B. TIB HAS FAILED TO DEMONSTRATE THE NEED FOR GRANTING A WRIT IN THIS INSTANCE.

TIB's petition speaks in terms of substantial need and direct conflict in seeking a hearing before this Court. A review of the authorities cited by TIB reveals neither the need suggested by TIB's petition nor the fundamental conflict in approach. Instead, what has developed throughout the circuits is a uniform standard with a recognized though limited exception in the unique or exceptional case. This litigation represents precisely such a case.

1. The Ninth Circuit's Handling of the Issue.

Various authorities surveyed by TIB confirm the Ninth Circuit's adherence to this Court's general rule as well as its recognition of both the need for that rule and the appropriate basis for limited exception. Both the panel writing this opinion and the Ninth Circuit in general have demonstrated an awareness of the basic principles being advanced by this Court.

In this appeal, for instance, the panel not only cited to this Court's decision in *Sunkist Growers Inc. v. Winckler & Smith Citrus Products Co.*, 370 U.S. 19, 82 S. Ct. 1130, 8 L.Ed. 2d 305 (1962), it also applied that general rule in its directions as to Lancer. Accordingly, that matter is being retried. It is therefore inappropriate for TIB to suggest that "the Court of Appeals did not address petitioner's argument that controlling Supreme Court authorities require reversal." (Petition, PP. 6-7.)

The underlying facts on TIB's appeal support a different result. No longer restricted by the litigation privilege, the Ninth Circuit was free to review the entire record and to reasonably conclude that the overwhelming weight of the evidence and particularly the character of that evidence would necessarily have caused the jury to find that TIB remained liable on the remaining causes of action. The trial court's discussion with the jury on the record further alleviated any concerns the appellate court might have had with regard to potential jury confusion. In short, the Ninth Circuit presumably realized that the appeal by TIB represented a perfect instance in which to depart from the general rule.

The Ninth Circuit has demonstrated the same discerning attitude generally. In many of the cases cited by TIB, the Ninth Circuit has acknowledged the general rule, citing *Sunkist* or other cases, and then chosen not to exercise its discretion to depart from that rule. For instance, in *Counts v. Burlington N. RR Co.*, 952 F.2d 1136 (9th Cir. 1991), the court cites *Sunkist*, acknowledges a potential exception under *Kern v. Levolor Lorentzen, Inc.*, but then chooses not to apply that exception. Similarly, in *Syufy Enterprises v. American Multi-cinema Inc.*, 793 F.2d 990 (9th Cir. 1986), the Ninth Circuit once again cites this Court's ruling in *Sunkist* and appropriately decides that the facts do not justify a departure from the general rule.

Two conclusions prevail from the Ninth Circuit's treatment of the general verdict issue. First, it has not "failed to address petitioner's argument" or otherwise ignored the issue. Second, it has exercised its limited discretion to depart from the general rule only where the facts are particularly egregious, as in this case.

2. Many of the Remaining Circuits Implement a Similar Approach.

TIB seeks to emphasize what it asserts is a "direct conflict" between the Ninth Circuit and "every other circuit" which has addressed this issue, but its survey of the law reveals a more uniform approach than its argument would suggest. Though different formulations appear, various circuits retain the discretion to preserve a general verdict, whether the concept utilized is "harmless error" or that the appellate court is "fairly convinced" or "reasonably certain" that the verdict was not influenced

by erroneous theories. *Morrissey v. National Maritime Union of America*, 544 F.2d 19 (2d Cir. 1976); *Simko v. C & C Marine Maintenance Co.*, 594 F.2d 960 (3rd Cir.), *cert. den.*, 444 U.S. 833 (1979); *Mueller v. Hubbard Milling Co.*, 573 F.2d 1029 (8th Cir.) *cert. den.*, 439 U.S. 865 (1978);[3] *Brochu v. Ortho Pharmaceutical Corp.*, 642 F.2d 652 (1st Cir. 1981).

TIB's assertion that the *Brochu* decision represents the only instance in which the general verdict was actually preserved does nothing but weaken its argument before this Court as it reflects the circuits' overwhelming adherence to the general rule. Ferguson does not suggest that every court in every circuit should automatically preserve a general verdict in each instance. Ferguson does contend, however, that in accordance with the various circuit court decisions listed in the petition, the appellate court should be invested with the discretion to depart from the general rule in the exceptional case where the record demands such relief. This appeal represents such a case.

C. THE PETITION SHOULD BE DENIED BECAUSE THE JURY, THE TRIAL COURT AND THE APPELLATE COURT REACHED THE RIGHT RESULT.

The focus of this opposition has been to demonstrate the unique factual nature of this appeal and in particular the character of TIB's conduct which has had a substantial impact on the jury, the trial court and the appellate

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[3] *Certiorari* was also denied by this Court in *McGrath v. Zenith Radio Corp.*, 651 F.2d 458, 464 (7th Cir.), *cert. den.*, 454 U.S. 835 (1981).

court. In reaching its unanimous result and awarding punitive damages, the jury was necessarily moved by TIB's conduct. The trial court listened to the evidence and then summarily denied all post-trial motions. Even the appellate court in its written opinion took pains to recite certain of the more egregious factual allegations emphasized in this brief in opposition. (*See* A-11.)

Separate and apart from the fact that this petition should be denied because its facts reject universal application, it should be denied because, at least as to TIB, the appellate court reached the right result. The record fully justified recovery on all tort theories submitted. TIB does not raise any further legal error on this petition. Accordingly, this Court should not exercise its limited review in this particular case.

CONCLUSION

For the reasons stated, the petition should be denied in its entirety.

Dated: July 25, 1995

Respectfully sumbitted,

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